COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BAY WATCH REALTY TRUST

v.

MARION BOARD OF APPEALS

No. 02-28

DECISION

December 5, 2005

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HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

In June 2001, Bay Watch Realty Trust, submitted an application to the Marion Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 192 one- and two-bedroom, mixed-income apartments on Front Street in Marion. The housing is to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB). After over a year of hearings, the developer appealed to the Housing Appeals Committee alleging that the lengthy hearings constituted the constructive denial of a comprehensive permit. On October 7, 2002, the Committee opened its hearing with a Conference of Counsel pursuant to 760 CMR 30.09(4), and the presiding officer ordered the matter remanded with an October 31, 2002 deadline for completion of the local hearing. Order, p. 2 (letter Oct. 7, 2002). The Board granted a comprehensive permit on December 3, 2002, but limited the size of the development to 96 units. See Exh. 1. The developer renewed its appeal, alleging that the reduction in the size rendered the proposal uneconomic. At the same time, abutters to the housing site appealed the Board's decision by filing suit in Superior Court.[1] On May 8, 2003, the Court stayed its proceedings pending the outcome of this appeal.[2]

The evidentiary portion of the Committee's *de novo* hearing began August 27, 2003, at which time a site visit was conducted.[3] The parties continued discussions concerning wastewater disposal, and at the second hearing session on November 4, 2003 the matter was remanded once again for further local proceedings. Tr. II, 20-23.[4] The parties' hope to resolve the wastewater issues, however, came to naught, and on January 16, 2004 the Board issued a decision in which it declined to provide access to the Marion wastewater treatment facility. Decision on Remand…, Case No. 480, p. 7 (filed Jan. 22, 2004).

The Committee's hearing reconvened in February, and continued for seven additional sessions. At the completion of the hearing, in response to motions by the Board, the presiding officer issued an Order Concerning Jurisdiction. He ruled that the evidence had shown that the project eligibility determination issued by the FHLBB member bank that established

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1. *Reiss v. Board of Appeals of the Town of Marion,… Massachusetts Housing Appeals Committee,… and Bay Watch Realty Trust*, C.A. No. 02-1552, Plymouth Super Ct. (filed Dec. 23, 2002).

2. The abutters have not moved pursuant to 760 CMR 30.04 to intervene in the Committee's proceedings.

3. The Committee issued a joint Pre-Hearing Order, agreed to by the parties. In it, the parties stipulated that Marion had not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that the Board's decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order (Aug. 27, 2003), § II-2. The parties did not stipulate to any of the jurisdictional requirements in 760 CMR 31.01(1); see Section III, below.

4. Volumes of the transcript refer to the following hearing dates: Tr. I (8/27/03), Tr. II (11/4/03), Tr. III (2/5/04), Tr. IV(c) (4/1/04)("(c)" refers to the version of Volume IV in which stenographic errors

fundability pursuant to 760 31.01(2) was defective; he found that the fundability requirements of 760 CMR 31.01(1)(b) had not been fulfilled; and pursuant to 760 CMR 31.01(5) he granted the developer 90 days to remedy the failure. Order Concerning Jurisdiction, p. 3 (Nov. 22, 2004). The developer remedied the jurisdictional defect with a new project eligibility determination from MassHousing (the Massachusetts Housing Finance Agency). The Board challenged this, filing a motion requesting a summary decision or reopening of the hearing or remand, but the presiding officer denied the motion and established a schedule for filing of briefs to complete the hearing process. Order, p. 4 (Mar. 21, 2005); see Section III, below.

II. FACTUAL OVERVIEW

The developer proposes to construct 192 one-and two-bedroom apartments in 16 twelve-unit buildings on a 33-acre, irregularly shaped lot.[5] Exh. 3; Tr. I, 45, 61. The parcel is zoned for commercial uses. Tr. I, 67, 150. It has about 200 feet of frontage on the west side of Front Street (Route 105), which is a main thoroughfare. Exh. 3. It is also within a half mile of two other major roads, Route 195 and Route 6. Tr. I, 66. Immediately abutting the site to the south on Front Street is a restaurant with a parking lot. Exh. 3. The longest boundary of the site runs to the southwest along an abandoned railroad right of way. Exh. 3. Across this right of way is a nursing home. Tr. I, 58. Behind the site, to the west, are wetlands owned by the Marion Land Trust, and to the north is a large cranberry bog. Tr. I, 58; Exh. 3. In the center of the parcel is a seven-acre area of wetlands, and the entrance

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have been corrected), Tr. V (6/10/04), Tr. VI (7/13/04), Tr. VII (9/8/04), Tr. VIII (11/17/04), Tr. IX (11/18/04).

roadway for the development will require filling of a 3,500-square-foot corner of these wetlands.[6] Tr. I, 54-55; Exh. 3.

Because of its location, utilities and municipal infrastructure are generally available to the site. As will be seen below, the one point of contention in this regard is that the developer proposes to connect to the municipal sewer system, which, the Board argues, is at or near capacity.[7]

III. JURISDICTION

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The applicant must be a limited dividend organization, the applicant must control the site, and the project must be fundable under an affordable housing program. See 760 CMR 31.01(1).

First, to prove site control, as required by 760 CMR 31.01(1)(c), the developer introduced purchase and sale agreements for two parcels that make up the site. Exh. 2

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5. At one point during the initial local hearing process, consideration was given to reducing the proposed development to 168 units. See Exh. 12. Nothing came of this proposal, and the developer continued to pursue its plans for 192 units.

6. Wetlands on the site have general significance since they limit site-design options, but wetlands issues were neither raised by the Board during the hearing nor briefed as a possible justification for the conditions limiting the size of the development. There is no evidence of a local wetlands bylaw. Tr. VII, 77-79, 83; cf. Exh. 33 (local regulations augmenting state law and regulations); also see *Perry v. Medeiros*, 369 Mass. 836, 842, 343 N.E.2d 859, 863 (1976)(provisions of municipal building code required to be admitted in documentary form).

7. Initially, the developer presented its proposal to the Committee with two alternative means of disposing of wastewater: either the municipal sewer or construction of an on-site wastewater treatment facility. See Tr. II, 10, 16. The issues concerning connection to the municipal sewer were clarified, however, when the matter was remanded to the local Board. At this point the developer's proposal is that the development be served by municipal sewer. The Board has declined to permit such a hook-up, and one of several questions before us is whether we should overrule that determination by the Board. See Tr. III, 3-7; Supplement to Initial Pleading… p.3 (filed Jan. 30, 2004); Developer's Brief, pp. 5-8; Board's Brief, pp. 42 - 48.

(section 5); Tr. V, 129-132.[8] The agreements are one entered into with Theodore J. Laycock on February 10, 2001 and a second entered into with the Estate of Howard B. Hiller on February 12, 2001. As noted by the Board, suit has been brought against the developer by the estate of Howard Hiller challenging the validity of the purchase and sale agreement. Tr. V, 142-143; VI, 26; also see Exh. 30. We have long held, however, that to establish site control, the developer need only establish a colorable claim of title, and that adjudication of complex title disputes or similar matters between private parties are best left to the expertise of the courts. *Hamilton Housing Auth. v. Hamilton,* No. 86-21, slip op. at 9 (Mass. Housing Appeals Committee Dec. 15, 1988), *aff'd sub. nom. Miles v. Housing Appeals Committee,* No. 89-122 (Essex Super. Ct. Oct. 6, 1989); also see *Billerica Development Co. v. Billerica,* No. 87-23, slip op. at 18-19 (Mass. Housing Appeals Committee Jan. 23, 1992); *Cloverleaf Apts., LLC v. Natick*, No. 01-21, slip op. at 7, n.3 (Mass. Housing Appeals Committee Dec. 23, 2002), *aff'd,* No. 03-0321 (Suffolk Super. Ct. Jan. 28, 2005); *Autumnwood, LLC v. Sandwich*, No. 05-06 (Mass Housing Appeals Committee Nov. 4, 2005 Ruling on Motion to Dismiss).[9] Our regulations specifically provide that "a contract to purchase the proposed site

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8. Exhibit 2 contains a number of documents submitted with the initial comprehensive permit application. The Board challenged site control during the hearing, and reiterated that challenge in its brief. Board's Brief, p. 20; also see Tr. VII, 9.

9. The case of *Parker v. Black Brook Realty Corp.*, 61 Mass. App. Ct. 308, 809 N. E.2d 1086 (2004) in no way undercuts our approach. In that case, the Land Court faced "the threshold question" of whether "access rights were a proper subject for [the planning board]." *Coleman v. Travers*, slip op. at 9, C.A. No. 263637 (Land Court Jan. 8., 2003, *rev'd sub nom. Parker v. Black Brook Realty Corp*, 61 Mass. App. Ct. 308, 809 N.E.2d 1086 (2004). The Appeals Court noted that "there [was] no contention that the [means of access was] public and, indeed, Black Brook [had] no legal right to its use." Further, before the Appeals Court, the argument made by the developer was "that the board and court are without authority to consider the question of Black Brook's rights in the parkway, and that a planning board may not consider the matter of title." In that context, the Appeals Court upheld the Land Court's authority, and stated that ownership of access rights is sufficiently consequential that the board is entitled to require an applicant to demonstrate ownership. We agree that access is important (though the Comprehensive Permit Law, unlike the Subdivision Control Law, requires,

shall be considered… to be conclusive evidence of the applicant's interest in the site." 760 CMR 31.01(3). Another section of our regulations indicates that this is a rebuttable, not an irrebuttable presumption. 760 CMR 21.07(1)(b). Also see *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 3-7 (Mass Housing Appeals Committee Dec 1, 2004 Ruling on Pre-Hearing Motions). The Board validity of the purchase and sale agreement clearly involves a number of difficult questions that also involve matters of probate and powers of attorney; further it involves facts that are not before us, nor should be before us. See Board's Brief, pp. 21-23, particularly, p. 21, n.46. We find that site control has been established by the two purchase and sale agreements, that there is no clear evidence to rebut the presumption, but that rather, the complicated dispute over the validity of the Hiller agreement should be left for resolution in the action currently pending in Superior Court. See Exh. 30.

The next jurisdictional issue is fundability. A presumption of fundability is created by a written project eligibility determination by a state or federal housing agency. 760 CMR 31.01(2). As noted above, the original determination in this case was found to be defective by the presiding officer. Order Concerning Jurisdiction, p. 3 (Nov. 22, 2004). The developer therefore submitted an updated application to MassHousing,[10] and a new determination was

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even with regard to the site itself, not full ownership, but only site control). Thus, under Chapter 40B, both the local Board of Appeals and this Committee should determine whether the developer has established a colorable claim of title to land which will provide access. But when there are complex title issues that are beyond the Committee's expertise, they should be left to the courts.

10. MassHousing issued this determination instead of the original FHLBB member bank because the presiding officer had ordered that the development be treated as a "new NEF" proposal rather than an "old NEF" proposal. That is, to ensure better oversight, the developer was required to comply with new regulatory procedures by obtaining a project eligibility determination from a public or quasi-public "program administrator" pursuant to 760 CMR 31.01(2)(g). See Order Concerning Jurisdiction, p. 3 (Nov. 22, 2004).

issued and filed with the Committee to cure the jurisdictional defect. MassHousing letter to Bay Watch Realty Trust (dated Feb. 16, 2005, filed Feb. 17, 2005). The Board challenged this new project eligibility determination, filing a motion requesting a summary decision or reopening of the hearing or remand, but the presiding officer denied the motion and established a schedule for filing of briefs to complete the hearing Committee's process. Order, p. 4 (Mar. 21, 2005). The Board continues to press a number of objections to the determination of project eligibility. See Board's Brief, pp. 6-18. This Committee, however, finds no merit in those objections for the reasons stated in the presiding officers' March 21, 2005 order, and rules that fundability has been established by the February 2005 MassHousing project eligibility letter.[11]

Closely related to fundability, is the requirement in § 31.01(1)(a) that the developer be a limited dividend organization. It is the role of the subsidizing agency to ensure that the developer is a proper limited dividend organization at the time the project receives final subsidy approval since profit limitations are generally inherent in the subsidy program. *Crossroads Housing Partnership v. Barnstable,* No. 86-12, slip op. at 9 (Mass. Housing Appeals Committee Mar. 25, 1987). The courts have concurred in our interpretation. *Maynard v. Housing Appeals Committee,* 370 Mass. 64, at 67, 345 N.E.2d 382 (1976); *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973)("...the question of standards for eligibility as a limited dividend organization is

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11. The Board has also attempted, both in its original decision and in it brief to the Committee, to preserve its right to raise a jurisdictional claim that the NEF is not a valid subsidy program. See Board's Brief, p. 26, n.51. We will not consider this issue, however, nor would we expect it to be considered by the courts should our decision be appealed, since no factual record with regard to the current nature and status of the NEF has been created. Equally important, the Board should not be heard to argue on one had that the NEF conferred jurisdiction for it to grant a permit for 96 units, but

properly left to the appropriate State or Federal agency."). The developer has committed itself to proceed as a limited dividend organization, and therefore satisfies the jurisdictional requirement. Tr. V, 59.

IV. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed… make it impossible to proceed… and still realize a reasonable return [or profit] as defined by the applicable subsidizing agency…." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

The Developer's Presentation

In the case before us, although the developer has objected to a number of conditions imposed by the Board, there are four that it alleges have the greatest financial impact and render the development uneconomic:

1. the reduction from 192 units to 96 apartments (Condition 9.5),[12]
2. the requirement of on-site wastewater treatment instead of municipal sewer

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on the other that the NEF does not confer jurisdiction upon this Committee to review the Board's decision.

(Condition 9.52; also see Decision on Remand…, Case No. 480, p. 7 (filed Jan. 22, 2004)),

3. the restriction of two thirds of the apartments to individuals aged 55 or older (Condition 9.27), and

4. the requirement that the age-restricted units contain elevators (Condition 9.25).[13]

To prove its case pursuant to 760 CMR 31.06(3)(b), the developer presented a *pro forma* financial statement prepared by its financial consultant and introduced testimony in support of it in order to show that the anticipated financial performance of the approved development would not yield a reasonable return.[14] Tr. IV(c), 26, 28. More specifically, after receiving the Board's decision, the developer prepared a schematic plan for the 96-unit development, as conditioned by the Board. Tr. IV(c), 17-21; see Exh. 23. From this, an estimate of development costs was prepared by sending it to a "site contractor," who estimated site preparation costs. Tr. V, 116; VI, 11-14; Exh. 29. From these and other estimates, including the past experience of the principals and the financial consultant, the "Development Analysis" portion of the *pro forma* was prepared. Tr. IV(c), 110-120; see

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12. The conditions appear in Exhibit 1, pp. 13-30.

13. Though it is unclear from the briefs and transcript, there may also have been a dispute with regard to placement of stairwells and building height. See Appellant's Brief, p. 12; Tr. IV(c), 16; V, 100-101; also see Conditions 9.10 and 9.23. It is hard to imagine how stairwell placement could be a matter of local concern, assuming the design complies with the state building code. Building height can be a significant local concern when nearby neighbors are affected. But that is not the case here, and any objections to the height of the proposed three-story buildings have been waived by the Board since it neither presented evidence in that regard nor briefed the issue.

14. The Board argues that because this expert's fee as a development consultant "increases slightly depending on the number of [housing] units that are ultimately built," his testimony is biased and should be given no weight. Tr. V, 13; Board's Brief, p. 49, n.127. Consultants employed on either side of affordable housing disputes are rarely completely disinterested. In this case, we respect the qualifications and credibility of the financial consultants employed by both the developer and the Board—each has testified before this Committee previously. We are confident of our ability to evaluate their testimony.

Exh. 24 (p. 2).

Then, estimates of operating costs and income were prepared to complete the "Operating Analysis." Tr. IV(c), 106-109; see Exh. 24 (p. 1). First, rents were established. A second, well-qualified consultant, who is a market analyst, a licensed appraiser, and a syndicator of affordable housing to institutional investors, conducted a thorough study of the Marion residential housing rental market. Tr. IV(c), 32-55. He established fair market rents for the various units in the 96-unit development approved by the Board as follows: two-bedroom senior apartments $1,200 per month, one-bedroom senior apartments $1,000 per month, two-bedroom non-age-restricted apartments $1,275 per month, and one-bedroom non-age-restricted apartments $1,075 per month.[15] Tr. IV(c), 55-56. Other routine and non-routine expenses were also included in the *pro forma*. For instance, an annual cost of $62,500 for maintenance for both the elevators and wastewater treatment facility required by the Board was included. Tr. IV(c), 109; Exh. 24 (p.1). Calculation showed that the gross income of $1,219,000 less operating expenses of $490,000 resulted in net operating income of $729,000. Tr. IV(c), 109; Exh. 24 (p.1).

Then, using a standard analysis, by "simple division of the net operating income divided by the total development cost of the project," he calculated that the Return on Total Cost (ROTC) for the development.[16] Tr. IV(c), 121. He projected that the ROTC would be

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15. The later, 96-unit *pro forma*, when compared to the earlier, 192-unit *pro forma*, showed slightly lower rents for the one-bedroom non-restricted units and slightly higher rents for the two-bedroom units. See Exh. 12, 24; Tr. V, 8. This appears to be of little consequence.

16. The financial experts testifying for both the developer and the Board agreed that ROTC a proper methodology for determining whether the development is economically feasible. See, e.g., Tr. IV(c), 121; VIII, 155-156. (Both in his testimony and on the *pro forma*, the developer's witness actually referred to "return on total assets," though the generally accepted term for this analysis is "return on total cost.") There is some debate as to whether there is value in using a similar, related methodology, internal rate of return (IRR). Though IRR is more sophisticated than the ROTC

4.55%. Tr. IV(c), 121; Exh. 24 (p.1). He concluded that this would be inadequate and that the approved development would not be economically feasible since the minimum profit accepted in the industry is a return of 7½%. Tr. IV(c), 121-124, 132.

The developer's expert supported his basic ROTC analysis with two other types of calculations. First, he calculated that *pro forma* figures would require an "extraordinarily high" cash contribution of $6.4 million, or 44% of the total development costs of $16 million, instead of the more typical 15-20%. Tr. IV(c), 122-123.) We find that this analysis is not directly relevant to the economic feasibility of the proposal.

Second, the developer's expert prepared two future-oriented analyses. He performed a ten-year Internal Rate of Return (IRR) analysis. Tr. IV(c), 126-127; see Exh. 24 (pp. 3). Though this is more sophisticated than the ROTC analysis in some respects, because much of the information that it is based on is approximate and because timing is important, it appears

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analysis in some respects, because much of the information that it is based on is approximate and because timing is important, at this preliminary stage in the review of a proposed development, the Committee believes that IRR adds little, and that ROTC is the preferred analysis. See Tr. IV(c), 127; V, 51; VIII, 144.

Although our regulation, 760 CMR 31.06(3)(b), refers to a reasonable return "as defined by the applicable subsidizing agency," as noted by the Board in its brief, subsidizing agencies had not defined such a return quantitatively at the time of the hearing. See Board's Brief, p. 26. Therefore, in the absence of policy direction, it is necessary for us to determine as a factual matter, based upon the testimony of the witnesses, whether the return in this case is reasonable in comparison to overall industry standards.

Recently, there has been published a document entitled "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005). These guidelines, which were endorsed by the state Department of Housing and Community Development, MassHousing (the Massachusetts Housing Finance Agency), the Massachusetts Housing Partnership (the Massachusetts Housing Partnership Fund), and MassDevelopment (the Massachusetts Development Finance Agency), state that "[a] projected ROTC of at least 2½... percent above the current yield on 10-year Treasury notes is generally required to fairly compensate capital investors…." Guidelines, p. 19; also see p. ii. This guidance, however, was not available to the parties at the time of the Committee's hearing, and we will not rely on it. In the future, however, it appears likely that the guidelines, though they do not have the force that at this preliminary stage of the development, this analysis adds little to the basic ROTC approach. Tr. IV(c), 127; V, 51. Nevertheless, the projected ten-year internal rate of return for the 96-unit development was 2%, which, the expert testified, is little more than would be available from a ten-year certificate of deposit from a bank. *Id.* His opinion was that a reasonable IRR would be 10.5%, and thus that the return projected for the 96-unit development was entirely inadequate. Tr. IV(c), 129. He also did a somewhat similar eleven-year projection based upon the standard methodology used by MassHousing. Tr. IV(c), 129-130; Exh. 24 (p.4). This shows a net cash flow as a percentage of imputed equity ranging from (in year one) 1.2% to (in year eleven) 2.8%. Tr. IV(c), 131; Exh. 24 (p.4). This, he concluded, is far short of the 10% that typically is expected by MassHousing.[17]

The Board's Presentation

In rebuttal, the Board presented testimony and an alternate *pro forma* prepared by its own financial expert. We will address each of the Board's rebuttal arguments, in the order it is presented in the Board's Brief. *Pro forma* review is very complex, and many other small points of discrepancy were raised during testimony. Those not specifically argued in the brief are waived. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995).

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of law, will provide a structure which should simplify proof by expert witnesses of the economic issues that arise under the Comprehensive Permit Law.

17. The expert indicated that, formally, the 10% return on imputed equity is the maximum profit allowed by MassHousing, but that "feasible projects achieve close to that 10%." Tr. IV(c) 130-131. This is the same threshold that we reviewed in *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 11 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002)(2002 WL 731689)("the upper limits that [MassHousing] sets on profit..., most significantly a 10% annual return on equity, in practice 'to a large extent act as minimum thresholds which are required to provide adequate incentives for developers to engage in the business of affordable housing development'").

A. Standard Benchmarks for Profit

First, the Board argues that "applying the [developer]'s own benchmarks," the 96-unit development is not uneconomic. Board's Brief, pp. 27-32.

(1) ROTC - The Board maintains that "the optimal range for [ROTC] is between 5.2% and 10.8%, not the 7½% minimum testified to by the developer's expert." See Board's Brief, pp. 27-28; Exh. 34. More specifically, its financial expert testified that 5½% is the minimum reasonable return for a development such as this. Tr. VIII, 156. This figure is based primarily upon comparison of five other comprehensive permit developments. Tr. VIII, 159. We are concerned that a figure based upon five discrete developments does not represent an overall industry standard to which the facts of this case can be compared. At a minimum, little evidence was introduced to establish the appropriateness of such a methodology.

The Board goes on to argue that based on the *pro forma* prepared by its expert, the ROTC of the approved development is 6.4%, that is, above its benchmark of 5½%. See Exh. 34. Of course, if the developer's calculation of the ROTC, 4.55%, is correct, even with the lower benchmark the development approved by the Board would be uneconomic. In fact, as will be seen below, we find that the proper figure for the ROTC lies between those presented by the parties (though considerably closer to the developer's figure than to that of the Board).

(2) IRR - The Board also makes a brief argument that its expert's 20-year analysis of internal rate of return is more accurate than the developer's 10-year analysis. The IRR analysis simply provides more detail than the ROTC analysis, but is based upon the same figures. We do not find the testimony of the Board's expert in this regard rebuts the evidence presented by the developer. Further, as noted above, this Committee relies primarily on an

ROTC analysis since the IRR provides little useful additional information. See Tr. IV(c), 127; V, 51.

(3) Cash Contribution - The Board maintains that the cash required from the owner would be 13%. Tr. IX, 33. As noted above, even assuming that this is based upon accurate figures, it does not have direct relevance to financial feasibility as we define it under the Comprehensive Permit Law.

(4) Projected Debt Service - The Board also makes an argument that it describes as related to "projected debt service." But this is simply a re-couching of its other arguments concerning profit. Its argument that after 20 years the development will generate "excess profits" that will have to be turned over to the town is insufficient to rebut the evidence presented by the developer. See Board's Brief, pp. 31-32; Tr. IX, 39-40.

(5) More troubling is the argument made by the Board's expert (but not elaborated in the Board's brief) that none of the *pro formas* prepared by the developer—that is, none of the developments that it was prepared to move forward with—show the 7½% profit that it claims is the necessary minimum. See Tr. IX, 36. The *pro formas* in question show the following:

Proposal	*net operating income*	*total development cost*	*ROTC*
192-unit (11/8/01) (Exhibit 26)	1,584,972	21,892,531	7.24%
192-unit (5/24/02) (Exhibit 12)	1,710,878	26, 145,932	6.54%
168-unit (5/24/02) (Exhibit 12)	1,481,471	23,333,539	6.35%
192-unit (7/8/02) (Exhibit 27)	1,704,038	27,092,123	6.29%
96-unit (3/25/04) (Exhibit 24)	729,577	16,025,890	4.55%

We cannot account for this anomaly, but since these figures do show higher profits for larger developments, and decreasing profit as time passed, we find that they are fundamentally consistent with the developer's position.

B. Rental Income Projections

The second argument made by the Board is that the developer's *pro forma* is not accurate due to faulty underlying assumptions, specifically, the projections for rental income (and other "specific critiques," see below). Board's Brief, pp. 32-34. We are not persuaded, however, that the Board's projections are more accurate than the developer's, nor that sufficient doubt has been cast on the developer's *pro forma* that we should not rely on it.

Specifically with regard to rental income projections, the Board presented testimony from its own licensed appraiser. He testified that age-restricted and non-restricted units would command the same rent, and that it would be higher than projected by the developer--$1,400 instead of $1,200 and $1,275 for two-bedroom apartments and $1,190 instead of $1,000 and $1,075 for one-bedroom apartments. Tr. VIII, 99, 116. The experts did similar analyses, and, as is frequently the case, it is difficult to determine which is more accurate. Here, however, timing is a factor. If the financial projections represented by the *pro forma* are to be meaningful, the variables must be set at the same point in time. Generally, the testimony we receive during our hearing attempts to establish land value, costs, rents, and other values as of the time of the hearing.[18] (Alternatively, all of the figures may be presented as of the time that the original *pro forma* was submitted to the subsidizing agency as part of the developer's application for preliminary approval or project eligibility determination pursuant to 760 CMR 31.01(2).) In this case, the Board's expert used rental figures projected forward five months beyond the date of his testimony and more than a year after the beginning of the hearing, and part if not all of the discrepancy between his and the earlier figures results from inflation of rents over time. Tr. VIII, 98-100. Under these circumstances, we find the analysis of the developer's expert to be the more appropriate and his testimony the more credible.

C. Specific Critiques of the *Pro Forma* (Exhibit 24)

Third, the Board offered other, specific "critiques" of the developer's *pro forma* by both its financial consultant and its engineering consultant. Board's Brief, pp. 34-37.

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18. One reason that we prefer to use the simpler ROTC analysis rather than an IRR analysis is because the latter, which projects income and expenses into the future, introduces additional variables concerning which reasonable people can differ and the expert witnesses often disagree, without shedding a significant amount of light upon the problem with which we are faced.

(1) The Board alleges that per-square-foot construction costs are "wildly inconsistent." We find no merit in this contention. The developer's expert explained that the first *pro forma*, prepared by the principals themselves in 2001, carried a low figure of $55 per square foot, which was a "direct trade figure" (i.e., that assumed the developer was the general contractor) and which was compensated for by a high developer fee. See Exh. 26, 24; Tr. V, 29. *Pro formas* prepared jointly by the principals and the consultant in May 2002 for 192-unit and 168-unit proposals showed costs of $65 per square foot Exh. 12; Tr. V, 31, 114. The July 2002 *pro forma* increased the cost to $70 per square foot. Exh. 27. The final *pro forma*, for the 96-unit development approved by the Board, showed a cost of $80. Exh. 24. The increase is adequately accounted for by design changes required by the Board, lost efficiencies of scale, and the passage of time. Tr. V, 71, 74, 76, 98-101, 107-108; cf, VIII, 127, 130, IX, 11-12. Significantly, the developer testified that the cost of a building that he currently has under construction, which is more similar to the simpler, 192-unit design than the 96-unit design approved by the Board, is between $72 and $75 per square foot. Tr. V, 120-121. The Board's engineer also testified that $80 per square foot is a reasonable figure. Tr. IX, 59.

(2) The Board notes that there is an additional $200,000 cost for an office management building in the 96-unit *pro forma* that does not appear in other *pro formas*. See Exh. 24. The developer's consultant was unable to explain this. Tr. V, 78-80. We find that this critique is valid, and this cost should not be allowed.

(3) Exhibit 24 includes $125,000 for legal fees. This is appropriate and allowable. See Tr. V, 84.

(4) Exhibit 24 includes a new figure for operating reserves of $245,100 instead of

$179,000. Tr. V, 86-87. This change is justified by increased time need to reach full occupancy due to the age-restriction the Board placed on two thirds of the apartments. Tr. V, 95-96; also see VIII, 135. We find that the figure of $245,100 is adequately supported.

(5) The Board also alleges that there was no "justification for the [developer's] claim that [age-restricted] dwelling units... will be rented out at a rate slower than [non-restricted units]." Board's Brief, p. 35. The presence or absence of a restriction is just one of many variables considered by the opposing experts in attempting to project exactly what rents will be realizable, and thus is addressed adequately in section IV-B, above. Nevertheless, we point out that there was specific testimony to support a slower "absorption" rate. E.g., Tr. IV(c), 60.

(6) The Board also argues that the *pro formas* introduced into evidence are inconsistent with the developer's application to the Federal Home Loan Band of Boston. Differing figures in these two documents might cast doubt on one or the other, but whether the inconsistency is of any importance is hard to determine since the application was not put into evidence. See Tr. VIII, 17; IX, 6-7. In any case, the two documents were prepared at different times for different purposes, and we know of no requirement that they be completely consistent.

(7) The Board argues that the overhead fee of 10% in Exhibit 24 is excessive. The developer conceded that the more commonly used figure is 8%. Tr. V, 21-22. The Board's expert is correct, and we accept the lower percentage, which results in a fee of $1,085,519. See Exh. 34.

(8) The Board also argues that "there is a difference in the 'site work and utility' costs claimed by the [developer] in Exhibit 24 [the 96-unit *pro forma*] and those shown in

Exhibit 29," which is the site contractor's estimate upon which the *pro forma* line item was based.[19] Board's Brief, p. 36. In its first, 2001 *pro forma*, the developer carried a "rough estimate" for site work and utilities for the 192-unit development of $1,500,000. Exh.. 26. In March 2004, it received from a site contractor a more specific estimate for the smaller development of $1,389,060. Tr. V, 116-117; VI, 11-17; Exh. 29. That figure "was slightly higher than what [the developer and its financial consultant] had estimated from the previous estimate," and they decided to use a lower number, $1,250,000 in the 96-unit *pro forma*. Tr. V, 116-117. We are not convinced by the Board's expert's conclusory testimony that "I would have anticipated a significantly greater decrease in cost given the fact that units served are approximately [half]." Tr. VII, 35. Comparison of the site plans for the 192-unit and 96-unit developments shows lot coverage by buildings, driveways, and parking areas of roughly the same magnitude. See Exh. 3, 23. The amount shown on the *pro forma* was based upon a detailed estimate, given the preliminary designs that are available at this stage in the comprehensive permit process, and we find $1,250,000 to be a reasonable estimate for site work and utilities.

(9) The Board argues that contingency costs of $548,000 and $87,000 on the *pro forma* should actually be considered profit. Carrying amounts for contingencies (both for hard costs and soft costs) as cost items is a standard practice; the developer's financial

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19. The critiques of site work costs, contingency costs, and treatment plant cost were from the Board's engineer. He raised questions, but provided few hard facts of his own. In fact, he stated twice that he had little basis for comparing the different cost estimates, and questioned the level of detail provided in the plans. Tr. VII, 45, 56, 43-56. Of necessity, the plans that are available at this stage in the comprehensive permit process are preliminary. See 760 CMR 31.02(2). The plans for the original proposal that were admitted into evidence in this hearing, which were prepared by a registered engineer and by a landscape designer, are typical. See Exh. 3 (Preliminary Layout Plan, Preliminary Utilities Plan, and Preliminary Grading and Drainage Plan), Exh. 4 (Conceptual Landscape Plan). Preparation of a conceptual layout plan for the smaller development approved by

consultant stated, "I am comfortable that they are a standard level of contingency…." Tr. IV(c), 154. We concur.

(10) Finally, the Board points to fluctuations in the cost of a wastewater treatment plant, and argues that those costs should have been reduced when development went from 192 to 96 units. In 2001 for the 192-unit proposal, the amount carried was $750,000; in 2002 it was $600,000; and in 2004 for the 96-unit proposal it was $700,000. Exh. 26, 12, 24; Tr. V, 68. The last estimate is based upon discussions with two engineers. Tr. V, 89, 106. We find that it is reasonable.

Synthesized *Pro Forma* Analysis

As indicated above, alternate *pro formas* were prepared by the developer's expert and the Board's expert. Comparison is easier than in some cases because the Board's expert helpfully, and in order to clarify his argument, used a "Development Analysis" and an "Operating Analysis" similar to the developer's approach, and also accepted many of the actual figures used in the developer's final *pro forma*. See, e.g., Tr. IX, 23; see Exh. 24, 34. Others figures, discussed above, remain in contention. We will analyze the areas of agreement and disagreement ourselves.

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the Board provides more detail than is typical in cases heard before this Committee. See Exh. 23.

Development Analysis – Our own development analysis follows the format used by both parties (Exhibit 24, p.2 and Exhibit 34, p. 2) with changes in specific figures as noted:

[Land] ***Acquisition***	**1,100,000**	not disputed
Landscaping	144,000	not disputed
Site work/Utilities	1,250,000	developer's figure, § IV-C(8)[20]
On-site Sewerage Plant	700,000	not disputed
Construction …	8,573,184	developer's figure, § IV-C(1)
Office/Mgmt Building	-0-	Board's figure, § IV-C(2)
Elevators …	240,000	not disputed
[Hard Cost] Contingency	548,159	developer's figure, § IV-C(9)
Sub-Total, ***Construction***	**11,455,343**	
Building Permits, … fees	76,800	not disputed
… Connection Fees	100,000	not disputed
Architectural Fees	50,000	not disputed
Legal, Title, …	125,000	developer's figure, § IV-C(3)
Accounting …	20,000	not disputed
Civil/Environmental …	200,000	not disputed
Finance Fees	123,429	not disputed
Taxes	50,000	not disputed
Insurance	38,000	not disputed
Construction Loan	405,603	not disputed
Rent-up Marketing	76,800	not disputed
Appraisal/Market Study	7,500	not disputed
Clerk of Works	-0-	not disputed
Operating Reserve …	245,100	developer's figure, § IV-C(4)
Development Consultant	95,000	not disputed
Add'l Review Fees	126,000	not disputed
110% Bonding …	87,415	not disputed
Soft Cost Contingency	87,000	developer's figure, § IV-C(9)
Developer Fee/OH	1,085,519	Board's figure, § IV-C(7)
Sub-Total, ***Soft Costs***	**2,999,166**	
Total Development Costs	**15,554,509**	

Thus, we find that the total development cost for the 96-unit development approved by the Board is $15,554,509.

20. The citations in this column refer to sections in this decision, above.

Operating Analysis – The operating analysis has two components, operating expenses and rental revenues. The Board's expert accepted all operating expenses. Tr. IX, 24. Therefore, we accept the figure for total operating expenses in the first year that is shown on both *pro formas*, which is $490,200. Exh. 24, p 1; 34, p. 3.

For the reasons discussed above in section IV-B, we accept the developer's rental income projection. It is $1,219,777. Exh. 24, p. 1.

Net operating income is rental income of $1,219,777 minus operating expenses of $490,200, or $729,577.

ROTC – The return on total cost (ROTC) is net operating income divided by total development cost, that is, $729,577 divided by 15,554,509 or 4.69%.

As noted in our discussion of both the developer's and the Board's presentations, above, we find that the developer's expert's opinion with regard to industry standards for the return necessary for an affordable housing development to be economically feasible is more credible than that of the Board's expert. We find that the minimum acceptable ROTC in this case is 7½%. Tr. IV(c), 121-124, 132. Therefore, based upon our own analysis that the projected ROTC for the development approved by the Board is 4.69%, we conclude that the conditions imposed by the Board make construction of the housing uneconomic.

V. LOCAL CONCERNS

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 31.06(7).

In this case, the issues raised relate to stormwater management (Board's Brief, pp. 39-40), site design (Board's Brief, pp. 40-42), and disposal of wastewater (Board's Brief, pp. 42-48).[21] Board's Brief, p. 13.

A. Stormwater Management

The Board's first argument to support its reduction of the proposal from 192 to 96 units is that the stormwater detention basins, as designed, are significantly undersized. Board's Brief, p. 39. The developer, who has no burden with regard to this issue, presented general testimony by the office manager of the engineering firm that it hired to perform site design.[22] It did so because it acknowledged that the stormwater drainage system design was preliminary and that more detailed plans would require review by the Marion Conservation Commission (and the Massachusetts Department of Environmental Protection, if necessary) to ensure compliance with the state's Stormwater Management Policy. Tr. I, 50, 152, 154.

21. Despite the attempt to define the issue by means of a Pre-Hearing Order, extraneous issues appeared at several points during the hearing, creating some confusion in the record. For instance, a civil engineer was called by the developer to testify solely with regard to water supply. Tr. III, 62-89. His testimony was that water supply was adequate, even though that issue was neither in issue before the Committee, nor briefed. See Tr. III, 66, 70, 72, 84; also see Tr. VII, 37. Many miscellaneous issues appear in section II-2 of the Pre-Hearing Order, which lists 43 conditions included in the Board's decision. In its brief, the Board did include a section entitled "Response to Specific Objections Raised by the Appellant," in which it discussed nine of those conditions. Board's Brief, pp. 48-53. With regard to each, it argued only that it had presented evidence that the condition "does not render the project uneconomic and has a rational basis." Board's Brief, pp. 51-53; also see Tr. VII, 26-38. But the standard that must be met by the Board is not simply that there be a "rational basis" for each condition. As noted above, once the developer has established that the conditions render the proposal uneconomic, the burden shifts to the Board to defend the substance of each condition. The Board clearly has not met this burden. To the extent that these nine conditions are simply routine, we have included their substance in our own order. See section VI-2(d), below. With regard to the many other conditions, the Board has waived them by choosing not to brief them. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). Of course, certain aspects of a number of these conditions are contained within the three larger issues that the Board did brief clearly—stormwater, site planning, and wastewater—and we will address them in that context.

On cross-examination, the witness testified clearly that the design conformed to good engineering practices. Tr. I, 164. A Preliminary Grading and Drainage Plan (stamped by a registered engineer) showing the location of two detention ponds and stormwater piping was admitted into evidence. Exh. 3, sheet 3.

The Board's expert did not review the 192-unit plan, but rather, reviewed an alternate 168-unit proposal. Tr. VII, 16. Testimony with regard to the latter is certainly relevant since any concerns about that plan would be exacerbated with regard to the larger proposal. He testified about a number of general concerns, including that the bottoms of the basins were set too deep, below adjoining wetlands. Tr. VII, 19-21. This testimony may, in fact, point to problems with the stormwater system design, and it is even possible that the developer may have to reduce the number of units below 192 since the development will have to comply with state law in any case. But the absence of a local bylaw[23] that regulates the stormwater management, the concerns raised by the Board's witness cannot constitute local concerns which support reduction in the size of the development; we have often noted that only under exceptional circumstances will we review matters that have not been regulated locally. See *Walega v. Acushnet*, No. 89-17, slip op. at 6, n. 4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n. 3 (Mass. Housing Appeals Committee Jan. 16, 1991). In any case, lest there be any doubt, we include a condition in our order requiring compliance with state law. See section VI-2(c), below.

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22. This expert witness is not, himself, a registered professional engineer. He has 25 years of experience in the field, however, is a registered surveyor and licensed soil evaluator, and supervises a staff of eight. Tr. I, 43, 46-47, 72.

23. See n.5, above.

B. Site Design

The Board raises various concerns about site design. It points out that there is no sidewalk for residents wishing to make the long walk from the interior of the site to Front Street; that the "tot lot" is within 50 feet of the originally proposed wastewater treatment plant; that residents will have to walk through the parking lots to reach two proposed "mini-parks;" that the site designer could not testify to the exact square footage of the tot lots, mini-parks, and open space; and that snow storage was not adequately described. Board's Brief, pp. 40-42. All of the supporting references in the Board's brief are to testimony from the developer's site designer, who stated, in support of the design, "we laid the site out in accordance with proper engineering,... or with good engineering practice based on today's regulations...." Tr. I, 164. We accept that statement, and do not find there to be significant evidence to the contrary. We conclude that the Board has not met its burden of proof with regard to site design. Nonetheless, we agree that a sidewalk would improve the design, and we will therefore require it by condition. See section VI-2(b), below.

C. Wastewater

It is uncontested that there is a location for a sewer connection readily available to the proposed development for the disposal of wastewater. See Tr. I, 45; III, 32

The developer's civil engineer testified that Marion's wastewater system is currently at or very close to its design capacity of 459,000 gallons per day (gpd). Tr. III, 23. Based upon a twenty-year improvement plan, changes are planned to increase the capacity to 588,000 gpd. Tr. III, 23, 29. The system will also be expanded to serve 375 failing septic systems. Tr. III, 24. The town has been approved to build an expanded treatment plant, and that is under construction now. Tr. III, 34. It is anticipated that the state discharge permit will be increased to 588,000 gpd. Tr. III, 34. This work is being done pursuant to the Town's Comprehensive Wastewater Management Plan (CWMP) and an Administrative Consent Order issued by the state Department of Environmental Protection (DEP). Exh. 16, 20. The proposed development will contribute 38,000 gpd to the system. Tr. III, 28. The engineer's conclusion is that when the upgrade is complete, the system will be able to accept the increased flow from the proposed development. Tr. III, 29.

In simple terms, the Board's argument is that the CWMP cannot be modified to respond to unexpected development. Board's Brief, pp. 43-45. However, we give more credence to the testimony and documentary evidence from the developer's engineer that "[s]ome, but not all, of the [new] available capacity is being allocated to the three new sewer expansion areas. ... [There will be 62,000 gpd in] available capacity for all other new sewer connections in town, plus... increases in connected commercial, industrial, and institutional establishments and an increase in infiltration/inflow.... We conclude... that there will be ample capacity in Marion's wastewater system to accept the flow from [the proposed development.]" Exh.17.

We find that with the construction of a new wastewater treatment facility there will be adequate capacity to accommodate the proposed development, and that the Board has not met its burden of establishing specific practical local concerns that preclude permitting the development to use the municipal sewer. We therefore order the Board to permit a connection to the town sewer.[24] See section VI-2(3), below. Of course, due to the existing

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24. If there is a waiting list for sewer connections, the Board should ensure that the proposed development is given a place on that list in conformity with the same policies or practices as are applied to all other applicants. This will ensure consistency with the statutory mandate that local requirements be applied equally to affordable housing. See G.L. c. 40B, § 20; *Peppercorn Village Realty Trust v. Hopkinton*, No. 00-09, slip op. at 10-14 (Mass. Housing Appeals Committee Jan. 26,

Administrative Consent Order and the state surface water discharge permit ("NPDES permit"), all necessary arrangements will require approval by DEP.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development, consisting of 192 total units, including 48 affordable units, shall be constructed as shown on drawings by Cullinan Engineering Co., Inc. (preliminary layout, utilities, and grading and drainage plans), June 22, 2001 (Exh. 3), and shall be generally consistent with landscaping details shown on the Conceptual Landscape Plan prepared by Hugh J. Collins, Jr., June 29, 2001 (Exh. 4). (No wastewater treatment plant will be constructed.)

(b) A sidewalk shall be constructed from the interior of the site to Front Street.

(c) Prior to commencement of construction, pursuant to 760 CMR 31.08(3), the applicant shall submit to the Marion Department of Public Works (or such other

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2004) and *Franklin Commons v. Franklin*, No. 00-09, slip op. at 13-16 (Mass. Housing Appeals Committee Sep. 27, 2001).

agent or department of the town as the Board may designate) a revised stormwater management report and plans prepared by the project engineer, together with required approvals, that demonstrate that the final plans comply with the DEP Stormwater Management Policy and the state Wetland Protections Act.

(d) Prior to commencement of construction the applicant shall comply with the following conditions (condition numbers from the Board's original decision are provided for reference only; to the extent that there are differences between the conditions described below and those in the Board's decision, the applicant is required to comply only with the Committee's condition, and not the Board's):

(i) Final plans, including plans for underground utilities, shall be reviewed pursuant to 760 CMR 31.08(3). (Conditions 9.6, 9.8, 9.10, 9.12)

(ii) The applicant shall comply with all state laws. (Conditions 9.7, 9.8)

(iii) The applicant may be required to post with the Marion Town Treasurer a bond, surety, or other performance guarantee for the purpose of securing completion of the infrastructure of the development. The amount of such bond or guarantee and the requirements related to it shall be no greater than those imposed on other developments in Marion. (Condition 9.47)

(e) The Board and other appropriate local officials shall take any and all necessary steps to permit the development to connect to the municipal sewer. If necessary, this shall include modifications to the town's Comprehensive Wastewater Management Plan (CWMP) as well as the state surface water discharge permit ("NPDES permit"), actions under the existing Administrative Consent Order or other administrative actions, all under the supervision of the state Department of Environmental Protection.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: December 5, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

LPc\m